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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 19

Justice

Index Number : 113564/2006
VERIZON NEW YORK
VS.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 9/6/13
which disposes of motion sequence(s) no. 001

FILED

SEP 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/6/13

Saliann Scarpulla J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

VERIZON NEW YORK, INC.,

Plaintiff,

- against -

CONSOLIDATED EDISON, INC., YONKERS CONTRACTING COMPANY, INC. and PETMAR BUILDERS, INC.

Defendants.

---------- X

Index Number: 113564/06
Submission Date: 5/1/13

DECISION and ORDER

For Plaintiff:
Pillinger Miller Tarallo, LLP
570 Taxter Road, Suite 275
Elmsford, NY 10523

For Defendant Con Edison:
Richard W. Babinecz
4 Irving Place, Room 1800
New York, NY 10003

Papers considered in review of this motion for summary judgment/motion to preclude:

Notice of Motion/Affirm. of Counsel in Supp/Exhibits.....1
Affirm. in Opp. to Defendant's Mot/Exhibits 2
Reply Affirm.....3

HON SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendant Consolidated Edison, Inc. ("Con Edison") moves for summary judgment dismissing plaintiff Verizon New York, Inc.'s ("Verizon") complaint pursuant to CPLR § 3212. In the alternative, Con Edison moves for an order: (a) precluding Verizon from offering evidence or testimony at trial or (b) dismissing the complaint based on Verizon's willful refusal to provide discovery pursuant to CPLR § 3126.

Verizon commenced this action on September 21, 2006 seeking to recover $107,253.01 from Con Edison for property damage to its underground cables.[1] In the complaint, Verizon asserted two causes of action against Con Edison for negligence and trespass. Verizon alleges that Con Edison damaged its underground cables near 313 East Third Street, Mount Vernon, New York, on or about April 13, 2004, by negligently operating its equipment, negligently excavating, and failing to provide a "mark-out" notice prior to commencing its excavation activities.

Verizon's local manager, James Walsh ("Walsh"), testified at his deposition that Verizon discovered the damaged cable on April 14, 2004 at 10:00 am. On the morning of April 14, Walsh received a call about "trouble in cable 4012 and 5134" located in Mount Vernon, New York. Walsh testified that there were "many reports" from customers in that area, and that there may have been at least a hundred customers without service.

Walsh dispatched a technician to the area to determine the source of the problem. Walsh testified that the technician traced the damage to the area near 313 East Third Street between Chestnut Place and South Columbus. According to Walsh, a "technician went to both manholes" at Chestnut Place and at South Columbus along East Third Street. Walsh testified that the cable was damaged approximately 170 feet east from the manhole at the corner of Chestnut Place and East Third Street.[2]

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[1] This action was discontinued as against defendants Yonkers Contracting Company, Inc. and Petmar Builders, Inc. pursuant to a stipulation of discontinuation filed on February 16, 2012.

[2] Although Walsh did not specify which manhole from which he measured the cable damage, I infer that Walsh identified the manhole at Chestnut Place based on the street layout (i.e., South Columbus lies east of Chestnut Place).

Walsh testified that after the cable was exposed through excavation, he observed the damaged cable – a "1200 pair lead cable with a hole in it." Walsh determined that Con Edison caused the damage to the cable based on his observation that the rods that Con Edison used to detect gas leaks "matched the holes that were in and around the area and underneath the patch and through our conduit and our cable" and that there was a "new piece of gas line on the ground." Walsh testified that he did not see any Con Edison employees working nearby.

Walsh further testified that several individual pairs of the cable were severed. Walsh explained that when a pair is severed, the customer associated with that pair loses service immediately. Walsh testified that it was "highly unlikely" that the cable was damaged one month prior to the discovery of the damage given the "extent of the damage that was done and all the customers going out at the same time."

Walsh testified that he did not know the depth of the cable. Walsh stated that information about the path and depth of the conduit is contained in Verizon conduit prints, and that cable information is contained in Verizon platts.

In its motion for summary judgment, Con Edison argues that the complaint should be dismissed because: (1) Con Edison did not perform any work in the location or in the time period that the cable was damaged; and (2) Verizon failed to mark out its facilities as required by 16 N.Y.C.R.R. 753.

Con Edison argues that it only performed work in the area on or about March 2, 2004, and that this work could not have caused the alleged property damage. Con Edison

emphasizes that the work it performed in the area did not cause an immediate disruption in service, which would be expected when pairs of cable were severed.

Con Edison submits testimony from its gas mechanic Earl Graham ("Graham"). Graham testified that Con Edison discovered a gas leak on March 1, 2004, during a routine inspection of the area near Chestnut Place in Mount Vernon, New York. Several Con Edison employees tested for the leak by inserting a "pogo stick with a rod" into the ground and taking measurements with a gas indicator. After determining that the leak required attention, Con Edison placed a request to "mark out" its facilities.

On March 2, 2004, Con Edison excavated the area where the leak was detected. Graham testified that the excavation was approximately four feet by three feet, with a depth of three feet. The excavation was completed using jack hammer and shovels.

After excavating, Con Edison made the necessary repairs to the pipe, and completed the repairs on the same day. Graham testified that once the excavation was open, he saw "just the [Con Edison] gas line" and he did not see any Verizon facilities. Once the repairs were completed, Con Edison installed a temporary blacktop and hired a contractor to install concrete over the area where the repairs were made.

Con Edison claims that its excavation was more than twenty feet from where the cable was damaged. Con Edison also submitted an affidavit from Graham. In his affidavit, Graham stated that "[i]n August 2012, I returned to the location with an investigator from the Con Edison Law Department." Graham stated that he measured the

distance "from a Verizon manhole located on Chestnut Place to the Con Edison excavation" and that the distance was 144 feet.

In the alternative, Con Edison moves for an order precluding Verizon from entering any evidence or testimony at trial, or in the alternative, dismissing the complaint based on Verizon's willful failure to provide discovery.

Con Edison claims that Verizon failed to respond to its discovery demands for the following items: (a) prints and platts showing the location of the Verizon facilities; (b) mark out records; (c) a drop folder containing trouble tickets and photographs; (d) paper timesheets documenting 338 hours of labor costs; (e) calculations of labor, engineering, and vehicular usage expenses and the FIN report; (f) customer reports; and (g) WAFA records.[3]

In opposition, Verizon argues that its complaint should not be dismissed because it responded to Con Edison's demands in a timely manner. On January 8, 2013, Verizon submitted several responsive documents with its opposition papers: (1) a color copy of the underground platts and/or prints; (2) a billing worksheet; and (3) an affidavit from reimbursable engineer Simone Boyce ("Boyce"). Boyce states in the affidavit that upon a search for the markout sheets and drop folder, Boyce found that the drop folder was destroyed and the markout sheets could not be located. Boyce also stated that the missing timesheets are "no longer available."

[3] Con Edison originally served combined discovery demands on January 26, 2007. Verizon responded to Con Edison's combined demands on March 15, 2007. Con Edison served further discovery and inspection on December 1, 2010, which Verizon provided a response to on March 17, 2011.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused the plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981). In a trespass to chattels action, the plaintiff must show that the defendant intentionally and wrongfully intruded or interfered with the plaintiff's personal property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487 (1983).

Here, I find that Con Edison made a *prima facie* showing of entitlement to judgment as a matter of law. Through the deposition testimony and documentary evidence submitted, Con Edison demonstrated that it did not cause the alleged damage to Verizon's cable because its work did not occur in the location or in the time frame in which the cable was damaged.

Verizon's local manager, James Walsh, testified that the property damage consisted of a hole in the cable, and that several pairs of the cable had been severed.

Walsh explained that when a pair is severed, the customer associated with that pair loses service immediately. Walsh further testified that Verizon's customers experienced a loss of service simultaneously, and that Verizon began receiving outage reports from customers on the morning of April 14.

Based on the type of cable damage and the immediate loss of service that resulted, Con Edison demonstrated that its work occurred prior to, and not within the time frame that the cable was damaged. As the cable damage consisted of severed pairs, and consistent with Walsh's testimony, the damage must have occurred shortly before customers experienced the loss of service on April 14. Con Edison's work in the area was completed on March 2, more than a month before customers lost service and the damage to the cable occurred. In addition, Con Edison demonstrated that it performed its work in a different location – more than twenty feet in distance – from where the cable was damaged.

I also find that Verizon failed to raise a triable issue of fact. Verizon did not submit any opposition papers in response to this motion. At oral argument, Verizon argued that a triable issue of fact exists because the hole found in the cable appeared to be the same type of hole created by Con Edison's gas leak detection tool. Counsel's argument is insufficient to raise a factual issue because it is merely speculative as to the cause of the damage. *Mandel v. 370 Lexington Avenue*, 32 A.D.3d 302, 303 (1st Dep't 2006). Walsh testified that he did not observe any Con Edison employees working in the area on or about April 14, and Verizon did not present any further evidence that Con

Edison caused the alleged damage to the cable. Therefore, I grant Con Edison's motion for summary judgment dismissing the complaint.

In accordance with the foregoing, it is

ORDERED that defendant Consolidated Edison, Inc.'s motion for summary judgment dismissing Verizon's complaint pursuant to CPLR § 3212 is granted, and the complaint is dismissed as against Consolidated Edison, Inc.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 6, 2013

ENTER:

Saliann Scarpulla, J.S.C.

FILED

SEP 09 2013

COUNTY CLERK'S OFFICE
NEW YORK